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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 102

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS R. POWERS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 586–591) is reported in 94 F. (2d) 783. The opinion of the trial court (R. 253–277) is reported in 16 F. Supp. 155.

JURISDICTION

The decree of the Circuit Court of Appeals sought to be reviewed was entered on February 1, 1938 (R. 591). Petitioner filed a petition for rehearing which was denied on March 8, 1938 (R. 591–592). The petition for a writ of certiorari was filed on June 8, 1938, and was granted on October 10, 1938. The jurisdiction of this Court is con-

ferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether waters, impliedly reserved by the Treaty of May 7, 1868, for the purpose of irrigating the lands of the Crow Indian Reservation, were reserved to the individual Indians of the tribe rather than to the tribe for the benefit of its people as is the case with Indian property generally—even though the lands were admittedly and expressly held in tribal ownership under the treaty, and nothing in the treaty implied otherwise as to waters.

2.[1] Whether allotments of 160 acres each of agricultural land to individual Indians of the Crow Tribe which were silent as to water rights created water rights appurtenant to 40 acres of such land, when no pertinent Act of Congress or treaty with the Crow Tribe contained provisions for transferring rights with respect to the use of waters upon the Crow Reservation, and when by Section 7 of the Act of February 8, 1887 (24 Stat. 388), the Secretary of the Interior was "authorized to prescribe such rules and regulations as he may deem

[1] Questions 2, 3, and 4, although they were anticipated and discussed in the petition for certiorari in view of certain language in the opinion, were thought to be not directly raised by the decision of the courts below. Accordingly, they were not stated in the petition as separate questions, but were discussed in the petition on pages 15–22. In order that the points may be more completely summarized, they are here stated as additional questions.

necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; * * *."

3. Whether the respondents may divert from the control of the Secretary of the Interior, for use on lands outside the project, any waters which are necessary for the irrigation of lands served by an irrigation project constructed, pursuant to the Act of March 3, 1891, with the consent of the tribe, before any allotment of lands to or appropriation of waters by the predecessors of any of the respondents, and having at the time of construction ample carrying capacity to irrigate the lands under the project.

4. Whether the issuance of fee patents to land upon an Indian reservation which transfer land not under Government irrigation "together with all the rights, privileges, immunities and appurtenances of whatsoever nature, thereunto belonging" affixes water rights as appurtenances to the land involved even though (a) such rights have been reserved previously by the Government and (b) under the law of Montana patents for land in the public domain do not carry with them any right to the use of water for irrigation purposes unless that right has previously been affixed to the land by lawful appropriation and use of water thereon.

5. Whether all the owners of lands within an Indian reservation are indispensable parties to a suit by the United States to enjoin certain landowners within the reservation from unlawfully di-

verting waters reserved for the irrigation of tribal lands—where (1) the respondents are wholly without right to divert waters from the stream without the consent of the Secretary of the Interior; (2) the diversion by the respondents interferes with the operation of a reclamation project constructed and maintained on the reservation for the benefit of the Indian tribe by the Secretary of the Interior pursuant to specific Acts of Congress; and (3) the absence of other landowners can neither harm the respondents (who may advance every pertinent defense to the suit, and under any decree could be subject to no liability to other landowners) nor prejudice such other landowners (who would not be subject to the decree sought, and whose supply of water would not be diminished if it were granted).

TREATY AND STATUTES INVOLVED

The pertinent parts of the Treaty of May 7, 1868 (15 Stat. 649), creating the Crow Indian Reservation; of the Act of April 11, 1882 (22 Stat. 42), providing for the allotment of Crow Reservation land; of the Act of February 8, 1887 (24 Stat. 388), commonly referred to as the General Allotment Act; and of the Act of March 3, 1891 (26 Stat. 1040), authorizing the construction of the Crow Irrigation Project system and making funds available therefor, are set forth in the Appendix, *infra*.

STATEMENT

In June 1934 the United States instituted this suit in the District Court for the District of Montana, Billings Division, against certain owners of land within the Crow Indian Reservation to enjoin them from diverting the waters of the Little Big Horn River, Lodge Grass Creek, and their tributaries, within the Crow Indian Reservation (R. 2-29, 40). Both courts below held that the Government was not entitled to the relief sought (R. 317–319, 591). The facts essential to an understanding of the case are as follows:

1. *Treaty of 1868.*—The Treaty of May 7, 1868, *infra*, setting aside certain lands for the Crow Indian Reservation, provided that any member of the tribe, being the head of a family, who desired to commence farming "shall have the privilege to select * * * a tract of land within said reservation, not exceeding 320 acres in extent, which tract * * * shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it." Members of the tribe, not heads of families, were given the right to select a tract of 80 acres. Those who commenced farming were entitled to receive "seed and agricultural implements" for the first four years, as well as instructions from a Government farmer. The treaty was

silent as to any rights to use the waters bordering on or flowing through the reservation.

2. *The Reclamation Project.*—More than 63,000 acres of land within the reservation were suitable for farming if waters could be made available for their irrigation (R. 6–7, 46, 106, 136, 353, 357). Accordingly, before 1885, the Government commenced the construction of irrigation works to divert the waters of the Little Big Horn River and Lodge Grass Creek, which flowed through the reservation, for use upon the lands (R. 9–10, 327–333, 335, 337, 343).

The General Allotment Act of 1887 (24 Stat. 388) provided:

> That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; * * *.

A few years later the United States and the Crow Tribe entered into an agreement whereby certain lands within the reservation were ceded to the Government, and in consideration therefor the Secretary of the Interior was authorized to expend $275,000 in the construction, maintenance, and management of a comprehensive irrigaton system (Act

of March 3, 1891, c. 543, 26 Stat. 1040). Thereafter, additional funds were made available for this purpose out of "annuity money due or to become due said Indians" (30 Stat. 947; 31 Stat. 247) or from funds due in consideration of further land cessions (33 Stat. 357). Under such authorization, from 1893 to 1915, repairs were made to the Reno ditch which was built in 1885 and five additional ditches were constructed at a cost of almost two million dollars with a sufficient carrying capacity to irrigate more than 23,000 acres within the reach of the project (R. 334, 335, 337–341, 349, 350–353, 357, 360). Four of these, including the Reno ditch, with a carrying capacity of 600 cubic feet per second (sufficient under the court's theory of the needs for each acre of the land to irrigate 48,000 acres; under the Government's theory 24,000 acres), were constructed before 1895 (R. 10–11, 333–337, 341–348), which was prior to any allotments to the predecessors of respondents (R. 59–62, 62–63, 68–69, 74–75, 79–80, 85–86, 89–90, 94–95, 154–155, 561).

3. *Allotments to Respondents' Predecessors.*—The Act of April 11, 1882 (22 Stat. 42), provided for the allotment to each head of a family in the Crow Tribe of not to exceed 160 acres of agricultural land and an equal quantity of grazing land. Others than heads of families were to receive a smaller acreage. Neither this Act nor the Act of February 8, 1887 (24 Stat. 388), contained provisions authorizing conveyance of a water right.

Commencing in 1901, allotments in severalty of tracts abutting or adjacent to the Little Big Horn River or Lodge Grass Creek within the reservation were made to the respondents' Indian predecessors pursuant to these Acts. These lands so allotted were not designated as irrigable at the time of their allotment (R. 311). The allotments were made following a letter of instruction by the Commissioner to the Special Allotting Agent which contained the statement: "As to the quantity of irrigable land to be given each Indian, it is thought that 40 acres will be an ample quantity" (R. 452). Only three tracts out of all the allotments made were subsequently classified as irrigable (R. 311). These allotments finally culminated, subsequent to 1906, in the issuance of fee simple patents as provided in the Act of May 8, 1906 (34 Stat. 182; R. 440, 459–460, 464, 466–468, 481–484, 486, 509, 516–517, 523, 525–526, 529–530, 533). The respondents have succeeded to the interest of the original allottees either by mesne conveyances or by purchase at Government sales of deceased allottees' lands (R. 308). None of the deeds or patents under which they claim title contain any express provision as to water rights but merely purports to convey the land "together with all the rights, privileges, immunities and appurtenances of whatsoever nature, thereunto belonging" (R. 308, 460). None of respondents' land is within the area irrigable by the Government project described above (R. 15, 17–26, 55–57, 114, 144), but,

from the time that patents were issued,[2] have been privately irrigated by water diverted from the Little Big Horn River and Lodge Grass Creek and their tributaries through privately owned ditches (R. 308–309, 357–360).

4. *Present Suit Filed.*—By reason of drought during the years 1931 to 1934 and the diversion by the respondents of waters upstream from the Government project, there was not sufficient water available to irrigate successfully the 8,000 acres being farmed under the Government project (R. 391–394, 399–403, 418, 433) and in 1934 conditions became so acute that serious crop losses were suffered—in many cases the crops being totally abandoned (R. 391, 398, 407, 410, 415, 417, 423, 425, 427, 430, 432). Accordingly this suit was filed to enjoin the respondents from diverting the waters of the Little Big Horn and Lodge Grass Creek and thus to make available all the waters of those streams necessary for the irrigation of lands within the Government project (R. 26–28).

In their answers the respondents alleged that as successors to Indian allottees they were entitled to divert as much water as they might need for irrigating their lands and "for stock, domestic and

[2] The trial court found that "the Peters ditch, owned by the defendants Dethlefsen, was begun and completed in 1896 and water was diverted through it to the lands of the Peters family, now owned by the defendants Dethlefsen, in the year 1896." No allotments were made, however, to members of the Peters family until 1901 to 1907, and patents were not issued until 1918 to 1923 (R. 154–155, 172–173, 460–468).

any other beneficial purposes," or one-half of one miner's inch of water per acre at the point of delivery (R. 64, 70, 75, 81, 86, 87, 90, 92, 95, 97, 120, 150, 157). As a further defense, respondents Yates and Dethlefsen, in their separate answers, also alleged that other persons were diverting waters upstream from the Government project under rights similar to theirs and "that there cannot be any complete adjudication as to water rights in said river, creek, and their tributaries without joining all of said persons as parties defendant herein" (R. 116–117, 146–147). A motion by respondents Dethlefsen to require the Government to make these persons parties defendant (R. 163–165) was denied (R. 221), as was an offer to prove the extent of their diversions (R. 439).

The trial court concluded, merely from the fact that lumber for a headgate on a ditch built by a predecessor of one of the respondents "was furnished by the irrigating outfit at Crow Agency" (R. 477), that ~~the~~ THIS appropriation of water ~~by these respondents~~ was "known to, sanctioned by and acquiesced in by the Secretary of the Interior and the Commissioner of Indian Affairs" (R. 309–310), although the evidence at the trial was that none of the respondents or their predecessors had been authorized by the Secretary of the Interior or any of his subordinates to construct ditches or divert waters from either stream (R. 358–360, 500).

5. *The Decree of the Trial Court.*—The trial court concluded as a matter of law that by the

Treaty of 1868 there was reserved, for the benefit of each individual Indian, "and not for the Crow Tribe of Indians * * * sufficient water to irrigate his irrigable land to the extent of forty acres", the right to which became vested upon the issuance of patents with a priority as of May 7, 1868 (R. 313–314). The court also concluded (R. 315):

> The attempt of plaintiff to make and enforce regulations granting to certain members of the Crow Tribe of Indians the right to use the waters of said river, creek, and their tributaries to the exclusion of other members is an usurpation of power and illegal.

Although the bill required no affirmative determination of the amount of water the respective parties were entitled to receive, a decree was entered dismissing it and awarding "each of said answering defendants" one-half miner's inch of water per acre at the point of delivery, and decreeing that "in case of shortage of water, each acre irrigable from said streams, or any of them, is entitled to its prorata share of the available water therefrom, whether such land is under a government ditch or not" (R. 317–319).

6. *The Decree of the Court Below.*—Upon appeal by the Government the court below held that:

> The District Court was right in holding that appellant was not entitled to an injunction, or to any relief in this case.

The court then held, however, that the trial court erred insofar as it attempted to determine the rights of the respondents because "such a determination would directly and materially affect all owners of lands within the reservation, many of whom are not parties to this suit" (R. 590). Accordingly a decree was entered, which reads as follows (R. 591):

> The decree [of the trial court] is modified by striking therefrom so much thereof as purports to grant affirmative relief to defendants, and by incorporating in said decree an order dismissing without prejudice the counterclaim of appellees Yates and Dethlefsen together with an order denying plaintiff's application for an injunction and dismissing its bill of complaint, without prejudice. As so modified, the decree is affirmed.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In holding that the waters of the Little Big Horn River and Lodge Grass Creek, and their tributaries, were reserved by the Treaty of May 7, 1868, for the benefit of individual Indians and not for the common benefit of the Crow Tribe.

2. In failing to hold that the United States, as guardian of the Crow Tribe and its members, may control and has exercised control over the waters within the Crow Reservation needful for the irrigation of the land therein.

3. In holding that the Secretary of the Interior was not authorized to prevent any allottee or patentee of lands in the Crow Reservation, or the successor in title of any such allottee or patentee from diverting the waters of the Little Big Horn River and Lodge Grass Creek.

4. In failing to enjoin the defendants, whose lands are not included in an irrigation project constructed, maintained and managed by the Secretary of the Interior, from diverting waters necessary for the irrigation of lands under the system.

5. In holding that all of the owners of lands within the reservation are necessary parties to this suit.

6. In holding that "The District Court was right in holding that appellant was not entitled to an injunction, or to any relief in this case."

7. In modifying the decree of the trial court by incorporating therein "an order denying plaintiff's application for an injunction and dismissing its bill of complaint, without prejudice" and in affirming the decree of the trial court as modified.

8. In failing to reverse the decree of the trial court and to order an injunction to issue as prayed for in the bill of complaint.

SUMMARY OF ARGUMENT

I

Prior to allotment, lands expressly reserved for an Indian reservation are held by the tribe in com-

mon ownership. The logical view is that the use of the waters impliedly reserved is held in the same ownership. This Court has indicated that such is the law.

II

Since, prior to the allotments, the use of the water was not affixed to the land as an appurtenance thereof, but ceased upon the Indian's death, the courts below must rely on the allotments and patents as the basis of their decisions. But neither the allotments nor the patents support the decisions below. The United States has plenary control over tribal property. It may allot lands, reserving for the tribe the use of waters. It has done so. The applicable allotment Acts neither expressly nor impliedly authorize the allotting agents to affix the use of water as an appurtenance to the land. Nor do the allotments or patents purport to do so. On the contrary the United States has placed control of tribal waters in the Secretary of the Interior by the Act of February 8, 1887, the Act of March 3, 1891, and subsequent irrigation Acts. The irrigation system constructed by the Secretary under the authority of an Act of Congress prior to allotments of any of the lands of the respondents served to dedicate and reserve waters necessary for the system. The rights, if any, of allottees, patentees and their successors, are subordinate to this prior reservation. The petitioner showed that there was not sufficient water to irri-

gate the lands in use under the system. The respondents admit that they are taking these waters by private diversion and without the consent of the Secretary of the Interior.

III

The suit brought by the Government was for an injunction against the wrongful diversion of waters from its control and not for an adjudication of water rights. An owner is under no obligation to join all who trespass on his rights to the use of waters. Since neither the respondents nor other landowners of the reservation will be adversely affected by the non-joinder of the latter, they are not necessary parties to the suit.

ARGUMENT

I

WATERS RESERVED BY THE TREATY ARE TRIBAL PROPERTY

When land was set apart for the Crow Indian Reservation by the Treaty of May 7, 1868, *infra,* no mention was made of waters within the borders of the reservation. It has long been settled, however, that under such a treaty the waters bordering on or flowing through the reservation are impliedly reserved for the Indians in a sufficient amount to supply their needs, including the irrigation of their lands. *Winters* v. *United States,* 207 U. S. 564, 576–577. The problem presented by the decisions below is whether this implied reservation was for

the benefit of the tribe or for its individual members. It is the position of the Government that the waters were reserved for the benefit of the tribe in common and not for the benefit of any individual Indian.[3]

It is clearly established that, prior to some division or allotment in severalty, Indian lands and property are held by the tribe in common ownership. *The Cherokee Trust Funds,* 117 U. S. 288, 308; *Cherokee Nation* v. *Journeycake,* 155 U. S. 196, 207; *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294. In the *Hitchcock* case, this Court said (p. 307):

> The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, * * *.
>
> Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members.

As stated with reference to the property of the Cherokee tribe in *The Cherokee Trust Funds* case, *supra* (p. 309):

> All public property of a nation is supposed to be held for the common benefit of its people; their individual interest is not separable from that of the Nation.

---

[3] The Government is not stressing any claim made below of ownership of these waters by the United States, except as guardian of the Indians and their tribal property, since whether the fee is in the Indians or the United States is immaterial with reference to the relief sought.

No reason appears why, in the case of water, the established principle that tribal property is owned in common should be departed from and the unnatural implication made that the waters are reserved for the individual Indians. If anything, water is less susceptible of individual ownership than land. Surely, in 1868 the Crows enjoyed it in common as they did land. Previous cases establish no authority for such a departure from the usual rule. On the contrary, while the point was not expressly decided in *Winters* v. *United States,* 207 U. S. 564, it is clear that when the Court there decided that the waters were impliedly reserved for the Indians it meant the Indian tribes and not the individual Indians, since, as is apparent from the bill of complaint in that case (pp. 565–567), the United States was proceeding on behalf of the several Indian tribes and not on behalf of individual Indians. Nor do *Skeem* v. *United States,* 273 Fed. 93 (C. C. A. 9th), and *Conrad Inv. Co.* v. *United States,* 161 Fed. 829 (C. C. A. 9th), cited by the Circuit Court of Appeals (R. 589, 590), support the contrary position of the court. Those cases did not purport to decide specifically whether the waters impliedly reserved were reserved to the Indian tribes involved or to individual Indians. Like the *Winters* case, the *Conrad* case was a suit by the United States on behalf of an Indian tribe. The *Skeem* case, in which the United States brought suit on behalf of individual Indians, involved the interpreta-

tion of treaty provisions expressly reserving waters to individual Indians occupying certain lands. The court construed the provisions in the light of the doctrine of the *Winters* case, that in the absence of an express provision there is an implied reservation. Cases like *United States* v. *Hibner*, 27 F. (2d) 909 (Idaho), relied upon by the trial court lend no support to the court's position for the same reason.

The decision of the trial court and that of the court below are both based upon their view that the right to the use of waters was reserved to the individual Indians in severalty. Upon that basis those courts have concluded that, when irrigable land was allotted to an Indian, somehow the several water right became appurtenant to 40 acres of the land and passed, as an appurtenance, to any purchaser of an allotment. Manifestly, for the reasons shown, the courts erred with respect to the basis of their decisions.

II

THE USE OF THE WATERS HAS NOT BECOME APPURTENANT TO ALLOTTED LANDS

Even if the initial assumption of the courts below that the water rights were reserved to the individual Indians were sound, it would not sustain the claims of the present respondents since they are not Indians. The District Court stated that prior to allotments any individual Indian's

right to land and water ceased upon his death (R. 264). Therefore to establish any rights in the respondents who were white purchasers of Indian allotments (in most cases, as respondents point out in their answers, of allotments of deceased Indians, R. 64, 70, 76, 81, 86, 91, 95) it would be necessary to go beyond the mere basic assumption upon which the opinions in the courts below seem to rest, and take the view that either the allotments or the patents from the Government affixed to the land, as an appurtenance, the right to the use of water. Indeed, it is clear that both courts below rely on the allotments and patents as the real basis of the rights of the respondents (R. 267, 307–308, 589). In some manner, not clear from the opinions, they reach the conclusion that upon allotment of tribal lands, or at least upon issuance of the Government patents thereto, the right to the use of water, which they suggest belonged to the individual Indian and would perish at his death, became affixed to the land as an appurtenance, and that the purchaser of an unrestricted patent got a right to take reservation water, free from any control by the Secretary of the Interior.

Taking the view of the Government that the use of the water as well as the land was in the tribe, the respondents might advance the theory that the use of the water was appurtenant to the land upon the creation of the reservation and at all times thereafter and would pass upon allotment.

Such a theory would be wholly unworkable in practice. For instance, there were over sixty-three thousand acres of land in this reservation which could be irrigated if waters were available (R. 6-7, 46, 106, 136, 353, 357). There were additional thousands of acres of land of other descriptions on the reservation (R. 6, 45). It must be remembered that water may be appurtenant to land for mining and other purposes as well as for irrigation. 2 Kinney, Irrigation and Water Rights (2nd ed. 1912) § 1012. The water supply, shown to be inadequate to irrigate eight thousand acres at the time of the trial (R. 357), would be practically valueless to all if the owners of even sixty-three thousand acres should have equal interests therein. The sensible view seems to be to treat tribal waters like the waters of the public domain. Until some steps have been taken by the Government, or under its direction, to affix to the lands the right to the use of waters, it remains tribal property to be used for various tribal purposes. Besides, this was an implied reservation for the Indians. It is difficult to believe that an Indian tribe, in 1868, when it knew little or nothing about irrigation and when the streams were chiefly useful to its members for fishing and stock-watering purposes, would conceive of tying the waters of a mountain stream to land as the white man does.

a. *Acting within its plenary powers with reference to tribal property, Congress has directed the*

allotment of lands in severalty but retained control of the waters.—It is elementary that the United States has plenary control of tribal property. The full measure of that control is shown in such cases as *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294; *Gritts* v. *Fisher,* 224 U. S. 640; and *Heckman* v. *United States,* 224 U. S. 413, 444. It goes to the extent that the United States may sell unalloted lands for the benefit of the tribe contrary to the provisions of a treaty with the tribe. *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 566.

Congress may, under this doctrine, allot lands in severalty yet sever the mineral rights and thus "create a distinct estate" which is "tribal land." *British-American Co.* v. *Board,* 299 U. S. 159, 164–165. Surely if Congress may do this it may, if it sees fit, allot in severalty tribal land without affixing the use of water thereto.

In examining the statutes to see whether Congress has made provision for affixing water rights to the lands, regard must be paid to the settled policy of Congress to treat lands and waters of the public domain separately, to the fact that in an appropriation State such as Montana a conveyance of lands will not carry with it the use of waters, and that the right to the use of waters for irrigation is ordinarily acquired by complying with the laws of the State. *Broder* v. *Water Co.,* 101 U. S. 274, 276; *United States* v. *Rio Grande Irrigation Co.,* 174 U. S. 690, 704; *Smith* v. *Deniff,* 24 Mont.

20, 60 Pac. 398, 50 L. R. A. 737, reversing 23 Mont. 65, 57 Pac. 557; *Mettler* v. *Ames Realty Co.*, 61 Mont. 152, 201 Pac. 702; cf. *Gutierres* v. *Albuquerque Land Co.*, 188 U. S. 545, 553; *Boquillas Cattle Co.* v. *Curtis*, 213 U. S. 339, 344–345.

There seems to be no more reason in the case of Indian lands than in the case of other lands why there should be a presumption that an allotment of land which is silent as to waters carries with it the right to the use of waters. Consequently, before an Act which authorized the allotments of Indian tribal land in severalty is to be held to fasten the right to use of water upon the lands as an appurtenance at the time of the allotment, there must be some language in the Act indicating such an intention. No language has been found in the applicable statutes regarding the allocation of Indian lands which so indicates. The pertinent allotment statutes are the Act of April 11, 1882 (22 Stat. 42), and the Act of February 8, 1887 (24 Stat. 388). Neither contains any provisions concerning allotment of the use of water. Not only are there no affirmative provisions calling for affixing water rights to the land or transferring the water rights, but Section 7 of the Act of February 8, 1887, clearly retains dominion over the waters in the Federal Government for the benefit of the Indians, for it provides:

> That in cases where the use of water for irrigation is necessary to render the lands

> within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; * * *.

It is difficult to see how the allotments made under that Act, which were silent as to water rights, fasten the use of water, as an appurtenance, upon forty irrigable acres out of each 160 of agricultural land. They were made under instructions, likewise silent as to water rights, to allot to each head of a family 160 acres of agricultural land. Only three 40-acre tracts out of the entire acreage to be allotted were classified as irrigable, and these were so classified subsequent to their allotment. The idea that the right to the use of water attached to forty acres out of each 160 acres of the agricultural land apparently arose from the fact that Special Allotting Agent Rankin had been told in a letter from the Indian Commissioner that the construction of the largest Government work had proceeded to a point which would enable the agent to determine what lands could be irrigated from it, and that it was thought that forty acres of irrigable land would be sufficient for each Indian (R. 452). Such instructions are clearly insufficient to give the allotment when made the effect of transferring water rights.

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Nor do the patents fasten any water rights upon the lands. They are silent as to water rights. The terminology "together with all rights, privileges, immunities and appurtenances of whatsoever nature, thereunto belonging" contained in the patents and upon which both courts below relied (R. 269, 308, 589), would pass only such water rights as were already appurtenant to the land. Such language alone would not create, as an appurtenance, any right to the use of water not previously appurtenant to the land. As previously shown, Congress had never made any such right appurtenant to the land. The cases cited by the trial court (R. 269–270) are not applicable. Typical is *United States* v. *Oregon,* 295 U. S. 1. That case holds that a conveyance by the Government of uplands bordering a non-navigable lake will not vest in the State title to adjacent land under water, although the state law so provides, where there is no basis for implying an intent on the part of the Government to convey title to the State. The excerpt quoted by the court (R. 269–270) is dictum, the Court stating in the immediately following sentence (p. 28): "But no such question is presented here, for there is no basis for implying any intention to convey title to the State." The case of *Oklahoma* v. *Texas,* 258 U. S. 574, cited and quoted in this excerpt, holds that a conveyance by the United States of Indian tribal lands bordering a stream will be governed by state law, "if its inten-

tion be not otherwise shown" (p. 595). These cases determine nothing here, irrespective of the intent of the Government with respect to the several patents involved. Under the law of Montana a grant of land with its appurtenances carries no water right unless water, in some way, has previously been made appurtenant to the land. *Smith* v. *Deniff*, 24 Mont. 20, 60 Pac. 398, 50 L. R. A. 737, reversing 23 Mont. 65, 57 Pac. 557; *Hays* v. *Buzard et al.*, 31 Mont. 74, 82, 77 Pac. 423; *Custer Con. Mines Co.* v. *City of Helena*, 52 Mont. 35, 43, 156 Pac. 1095; 2 *Kinney, Irrigation and Water Rights* (2d ed. 1912) §§ 1009, 1011.

Furthermore, the United States has shown an intention to reserve the waters. Therefore, according to *United States* v. *Oregon* and *Oklahoma* v. *Texas* (*supra*), and related cases, the patents would not pass any water rights. See also *United States* v. *Winans*, 198 U. S. 371, in which this Court held that patents from the Government absolute in form, which normally would carry fishing rights along the Columbia River shore, did not do so when the fishing rights had been previously reserved to Yakima Indians.

b. *The control of the use of waters of the Indian reservations has been placed in the Secretary of the Interior.*—Section 7 of the Allotment Act of February 8, 1887, quoted *supra*, p. 22, places control of the use of the water on the reservation in the Secretary of the Interior. This section is a

part of a general Act applying to numerous tribes and varying conditions. It does not relate solely to the circumstances of the Crow Reservation. Obviously, it is based upon the plenary power of the United States to manage and control the common tribal property for the common benefit of the tribe and, in the exercise of that power with respect to the utilization of the common water supply of any reservation acquired for irrigation, imposes upon the Secretary of the Interior the duty and authority to use the power for the common benefit of the resident Indians.

Question was raised below as to the extent of that control. First it must be borne in mind that Indians of the various tribes were inexpert agriculturalists and unacquainted with the complexities of irrigation farming. To allow each Indian to take out waters where he pleased, as respondents argue they are entitled to do, would have created an intolerable situation if each had exercised the right. In the second place it is to be noted that Congress was concerned with securing just and equal distribution of water among the Indians residing upon each of the reservations subject to the act. On many of them, as on this one, the amount of irrigable land was large and the supply of water limited. The accomplishment of that purpose under the diverse circumstances to which that general act applies would require a great measure of control. Indians with land lying close to a stream

might procure water with comparative ease while those who lived some distance away, particularly those of limited resources, could not. Some Indians dwell on irrigable lands, others on land not susceptible to irrigation. Some might occupy lands which do not need irrigation. Presumably these facts were known to Congress and considered when the act was passed as the first sentence of Section 7 indicates. The power conferred must have been intended to be broad enough to accomplish its stated purpose under these evident diverse circumstances. A power as narrowly limited as that which respondents say this section confers would be utterly inadequate. Nothing short of power to control and direct irrigation projects could procure a just distribution. It is also obvious that an irrigation project can not be operated effectively without control of the waters necessary to the system. It is the Government's contention that this act recognizes that the United States had full power to control the distribution of water for irrigation and directs the Secretary of the Interior to exercise that power for the United States on behalf of the Indians.

This interpretation is supported by subsequent legislative interpretations in the acts of Congress appropriating money for the construction, maintenance, and operation of an irrigation system on the Crow Reservation, discussed, *infra*, pp. 28–30. The first one of these, the Act of March 3, 1891, gave

to the Secretary the broadest of powers in the selection of the valleys to be irrigated and in the management of the system of irrigation there provided.

Therefore, it is submitted that the courts below erred in assuming that the Secretary's power was limited to prescribing "rules and regulations," and in holding that the respondents might divert waters in defiance of his control.

c. *Any rights which the allottees got by reason of their allotments were subject to the prior reservation of waters for the use of lands under the Government's irrigation system.*—From the cases previously cited regarding plenary control, *supra* (pp. 20–21), it is apparent that even against the wishes of the tribe or its members, Congress would have power to dedicate waters of the reservation to the irrigation of those lands which the Secretary of the Interior should find to be irrigable. *A fortiori* it could do so with the consent of the Indian tribe for whose benefit the waters were reserved. It is submitted Congress has clearly done so with respect to the waters in litigation.

If Section 7 of the Allotment Act of 1887 did not place the control of all waters of the reservations in the Secretary of the Interior, the Act of March 3, 1891 (26 Stat. 1040) passed in pursuance of an agreement with the Crow Tribe and the construction of irrigation works under authority of that statute have set apart and reserved the waters in question for the lands under the system of irriga-

tion so established. In no event would such reserved waters pass to allottees of lands which were not under this system.

More specifically, that Act authorized the construction of the Crow Irrigation Project system and made funds available therefor.[4] By Section 31 Congress appropriated funds "to be expended under the direction of the Secretary of the Interior in the building of dams, canals, ditches, and laterals for the purposes of irrigation in the valleys of the Big Horn and the Little Big Horn Rivers and on Pryor Creek and such other streams as the Secretary of the Interior may deem proper * * *." The money was appropriated to be expended under his direction "for the maintenance and management of the system of irrigation provided for in this agreement [with the Crow Indians]."

Fairly construed, this Act must be regarded as (1) vesting in the Secretary of the Interior, in addition to the authority already vested in him by Section 7 of the general Act of February 8, 1887, authority to determine the lands feasible of irrigation by means of the irrigation system (and obviously such authority is necessary to enable him to determine the location and extent of the ditches and canals to be constructed); (2) vesting in the Secretary of the Interior authority to take such of the

[4] Acts of March 1, 1899 (30 Stat. 947), May 31, 1900 (31 Stat. 247), and April 27, 1904 (33 Stat. 357), made further funds available for the system.

waters within the Crow Indian Reservation as may be found needful for the irrigation of the lands so determined to be feasibly irrigable; and (3) dedicating waters so taken to the needs of the lands lying under the irrigation system.

Otherwise, the absurd result would obtain, as it does under the decisions of the courts below, that Congress has authorized the Secretary to construct an irrigation system but withheld from him authority to take the waters essential to render it useful. A carefully constructed ditch with no water to flow through it is an obstruction to farming instead of a benefit. The "maintenance and management of the system of irrigation provided for" would be impossible without the water necessary for its operation. Nor was advance notice of the amount to be appropriated required as is the case when the Reclamation Service reserves or appropriates the unreserved waters of the public domain for an irrigation project (*Nebraska* v. *Wyoming*, 295 U. S. 40, 43). The waters in question were tribal waters and the Government might reserve or appropriate, as it did, an indefinite amount, that is, such amount as might be necessary for the contemplated system, without filing notice anywhere as to the limit of the amount of waters to be taken. Prior to 1894 and before any allotments to respondents, the greater portion of the system had been completed and was in operation with a carrying capacity of 600 cubic feet per second (R. 10–11,

333–337, 341–348), or 24,000 inches (R. 434, 489, 492), which under the court's finding would be sufficient to irrigate 48,000 acres (R. 310), and under the Government's contention 24,000 acres (R. 7, 435). There was not sufficient water available in 1934 for irrigating the 8,000 acres being farmed under the project (R. 433).

Since provision was made for the system and the waters necessary for the irrigation of lands under it were reserved prior to any allotments and patents to the respondents or their predecessors, their rights, if any, are subordinate to those of the system.

III

OTHER LANDOWNERS IN THE RESERVATION WERE NOT INDISPENSABLE PARTIES

Wholly disregarding the theory of the bill of complaint, which sought merely a determination whether the United States may control all waters needed for the irrigation of the lands of the reservation, and if not all, then those dedicated and reserved to its irrigation system prior to the making of allotments to the respondents' predecessors, the District Court acceded to the request of the respondents for a determination entitling them to a pro rata per acre share of the water and treated the suit as one for an adjudication of water rights (R. 316–317). The Circuit Court of Appeals treated the suit in the same manner and directed the dismissal, without prejudice, of the bill and the

counterclaim, indicating that affirmative relief could not be granted because of nonjoinder of all landowners within the reservation, whom it regarded as necessary parties (R. 590–591). But it is the position of the Government that the suit is not one for an adjudication of water rights and that the bill should not have been dismissed for defect of parties, whatever action may have been appropriate with respect to the counterclaim.

The suit was for an injunction, not for an adjudication of water rights. The bill of complaint required the District Court and the Circuit Court of Appeals to determine (a) whether the United States as guardian of the Indians might control, to the exclusion of the respondents, all waters needed for the lands within the project, and (b) whether the limited supply of water was needed for such lands. An affirmative answer to these questions should have resulted in the granting of the injunctive relief sought, since the respondents were taking water without the consent of the Government officials (R. 26, 357–360) as one of the respondents admitted (R. 500). It was error for the courts below to depart from the theory of the bill of complaint and treat the suit as the usual water suit requiring determination of amounts of water to which the respondents, as between all users, might be entitled.

It may be true that all the landowners would be necessary parties to the suit on the cross bills, but, since the bill of complaint does not require adjudi-

cation of water rights, all landowners within the reservation are neither necessary nor indispensable parties in order to grant the relief sought by the Government. As said by the Court in *United States* v. *Conrad Inv. Co.*, 156 Fed. 123 (at page 132):

> Another question presented is whether complainant can maintain this proceeding without at the same time making all other appropriators and users of water from the same stream parties to the suit, that the correlative rights of all the parties to the use of such water may be settled and adjusted. I am of the opinion that it can. Any invasion of the government's right to the use of the water from said stream would give it cause for suit. And this would be so whether the shortage to the government was caused by one or several parties. All would be trespassers, and the government could sue some or all jointly, or any one of them severally, as it might feel disposed.

See also *Sander* v. *Wilson*, 34 Washington 659, 76 Pac. 280; *Beck* v. *Bono*, 59 Washington 479, 110 Pac. 13. The court below has cited no authorities to support its position.

It is true that cases may be found in which rights in water are subject of controversy and which are not suits for the adjudication of a stream, in which absent parties are held necessary or even indispensable parties to the suit. Cf. *Commonwealth Trust Company* v. *Smith*, 266 U. S. 152, 160–

161; *Veitia* v. *Fortuna Estates*, 240 Fed. 256, 261 (C. C. A. 1st); *American Falls Reservoir Dist. No. 2* v. *Crandall*, 82 F. (2d) 973, 978 (C. C. A. 9th). But in these cases the decree sought, if granted, would have operated directly to deprive the absent parties of an amount of water to which they were entitled or the rights of the parties to the suit would be adversely affected by the absence of such parties.

In the present case, however—where (1) landowners within the reservation other than the respondents will not be affected by the operation of the decree sought, since the decree will not serve to cut down their supply of water; (2) the respondents will not be adversely affected in establishing their rights by the absence of other landowners, and (3) if the decree goes against them they will be subjected to no liability to the other landowners by reason thereof—such landowners are neither necessary nor indispensable parties to the suit. The fact that a decision in favor of the petitioner will serve as a precedent in suits against other landowners interfering with the control of the Secretary of the Interior will not in itself make those landowners indispensable parties.

Clearly, with reference to the issues raised in the bill of complaint, the conclusion of the court below that "such a determination would directly and materially affect all owners of lands within the reservation" (R. 590) was erroneous—unless it was referring to the cross bills, which, of course, do not affect the Government's position here.

Moreover, if all landowners within the reservation are necessary parties, then logically all parties using the stream in question off the reservation would also be necessary parties. For example, all water users along Pass Creek, a stream arising in Wyoming and emptying in the Little Big Horn River in Montana (R. 379) should be joined. "Under such conditions, it would be impossible for one of the claimants to force all of the others into any tribunal in a single suit." *Washington State Sugar Co.* v. *Sheppard,* 186 Fed. 233, 235. But the United States, where its bill of complaint was never framed for an adjudication of water rights, may not be required to assume the burden of bringing into the suit a multiplicity of parties or of maintaining an interstate suit.

CONCLUSION

Congress early saw that economical use of a limited supply of water on Indian reservations, if the Indians were to get a just and equal distribution of it, required the construction of irrigation projects and the control by the Federal Government of the waters of the reservation. The Government has already expended over $50,000,000 of tribal and public funds in the construction and maintenance of irrigation projects on Indian reservations, approximately $2,000,000 having been expended on the Crow Irrigation Project (R. 352, 354). Control by the Federal Government is now more neces-

sary than ever, since much of the land of the reservation has fallen into the hands of the whites as a result of the era when unrestricted patents were freely given to Indians.

With the vastly heavier demands of the white irrigators in contrast with the simple wants of the Indians, it is obvious that the distribution of the limited supply of water for vast acreages on a pro rata basis as sanctioned by the court below would result in an utter waste of water. None of the lands would receive enough water to justify their cultivation, particularly if allottees, patentees, and their successors were to be permitted to divert water from the rivers wherever they please, as respondents have done, with consequent greater losses by evaporation, seepage, and other unavoidable irrigation losses.

The testimony in the present case shows that the policy of the Government to secure a just and equal distribution of the water among the Indians has been thwarted by the respondents and that crops have been abandoned by reason thereof (R. 410, 415). If the decrees below are permitted to stand, like action on the part of the thousands of other allottees, patentees, and their successors will deprive the Secretary of the Interior of all control of the waters of the reservation and of the irrigation projects.

Since the waters of the Crow Reservation were reserved for the benefit of the tribe; since the

United States has reserved control and supervision of such waters for the benefit of the Indians, and has placed the exercise of that control in the Secretary of the Interior, and in addition has reserved from allotment or appropriation for other lands sufficient waters for the irrigation of lands under its governmentally constructed irrigation projects; and since all other landowners on the reservation are not necessary parties to this suit for an injunction against trespasses, respondents should be enjoined from taking such waters from the control of the Secretary of the Interior.

Wherefore, it is respectfully submitted that the decree of the court below should be reversed and the cause remanded with instructions to grant the injunction prayed for by the Government.

ROBERT H. JACKSON,
Solicitor General.

CARL MCFARLAND,
Assistant Attorney General.

C. W. LEAPHART,
Attorney, Department of Justice.

OCTOBER 1938.

APPENDIX

The pertinent articles of the Treaty of May 7, 1868, 15 Stat. 649, are:

ARTICLE II. The United States agrees that the following district of country, to wit: * * * shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons, except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will, and do hereby, relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid.

ARTICLE VI. If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding three hundred and twenty acres in extent, which tract,

when so selected, certified, and recorded in the "Land Book," as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected a certificate, containing a description thereof and the name of the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Crow Land Book."

The President may at any time order a survey of the reservation, and, when so surveyed, Congress shall provide for protecting the rights of settlers in their improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations and the internal police thereof, as may be thought proper.

The pertinent parts of the Act of April 11, 1882, c. 74, 22 Stat. 42, are—

First. That the Government of the United States cause the agricultural lands remain-

ing in our reservation to be properly surveyed and divided among us in severalty, in the proportions hereinafter mentioned, and to issue patents to us respectively, therefor, so soon as the necesary laws are passed by Congress. Allotments in severalty of said surveyed lands shall be made as follows:

To each head of a family not more than one quarter-section, with an additional quantity of grazing land not exceeding one quarter-section.

To each single person over eighteen years of age not more than one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section.

To each orphan child under eighteen years of age not more than one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; and

To each other person under eighteen years, or who may be born prior to said allotments, one-eighth of a section, with a like quantity of grazing land.

All allotments to be made with the advice of our agent, or such other person as the Secretary of the Interior may designate for that purpose upon our selection, heads of families selecting for their minor children, and the agent making the allotment for each orphan child. The title to be acquired by us, and by all members of the Crow tribe of Indians, shall not be subject to alienation, lease, or incumbrance, either by voluntary conveyance of the grantee or his heirs, or by the judgment, order, or decree of any court, nor subject to taxation of any character, but shall be and remain inalienable and not subject to taxation for the period of twenty-five years, and until such time thereafter as the President may see fit to remove the restric-

tion, which shall be incorporated in each patent.

SEC. 2. That the Secretary of the Interior be, and he is hereby, authorized to cause to be surveyed a sufficient quantity of land on the Crow Reservation to secure the settlement in severalty of said Indians as provided in said agreement, and upon the completion of said survey he shall cause allotments of land to be made to each and all of the Indians of said Crow tribe in quantity and character as mentioned and set forth in the agreement above named, and upon the approval of said allotments by the Secretary of the Interior he shall cause patents to issue to each and every allottee for the lands so allotted, with the same considerations, restrictions, and limitations mentioned therein as are provided in said agreement.

The Act of February 8, 1887, c. 119 (24 Stat. 388), is in part as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:

To each head of a family, one-quarter of a section;

To each single person over eighteen years of age, one-eighth of a section;

To each orphan child under eighteen years of age, one-eighth of a section; and

To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section: *Provided,* That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act: *And provided further,* That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act: *And provided further,* That when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual.

SEC. 2. That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivi-

sion of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: *Provided,* That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which election shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

SEC. 3. That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office.

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for

the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided,* That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act: *And provided further,* That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell,

on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: *Provided, however,* That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: *And provided further,* That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto.

And if any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And hereafter in the employment of Indian police, or any other employes in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

SEC. 7. That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

The pertinent part of the Act of March 3, 1891, c. 543, 26 Stat. 1040, is—

That in consideration of the cession of territory herein made by us as individual Indians and heads of families of the Crow tribe

to the Government of the United States, the said Government of the United States, in addition to the annuities and sums for provisions and clothing stipulated and provided for in existing treaties and laws, hereby agrees to pay the sum of nine hundred and forty-six thousand dollars lawful money of the United States, in the manner hereinafter described:

First. That of the above-named sum there is hereby appropriated and set apart two hundred thousand dollars to be expended under the direction of the Secretary of the Interior in the building of dams, canals, ditches, and laterals for the purposes of irrigation in the valleys of the Big Horn and the Little Big Horn Rivers and on Pryor Creek and such other streams as the Secretary of the Interior may deem proper: *Provided,* That not to exceed fifty thousand dollars shall be expended annually in performing this work: *And provided further,* That the superintendent in charge of said works shall, in the employment of laborers, be required to give preference to such Indians of the Crow tribe as are competent and willing to work at the average wages paid to common laborers for the same kind of work, and the labor so employed shall be paid in cash.

That the sum of seventy-five thousand dollars is hereby appropriated and set apart as an irrigating fund, to be expended under the direction of the Secretary of the Interior for the maintenance and management of the system of irrigation provided for in this agreement.

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